BRIEF IN SUPPORT OF PETITION.

Opinions.

Before the National Labor Relations Board, the case was disposed of by an order against the petitioners based upon findings of facts resulting from a hearing, all in accordance with rules and regulations as provided. This order is reported in full in the record on pages 317-339.

The opinion of the Circuit Court of Appeals, delivered by Circuit Judge Mahoney on October 25, 1940, enforcing the order of the National Labor Relations Board, is reported herein on pages 9-17, inclusive.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act (Public Act No. 198, 74th Congress, approved July 5, 1935), *supra*, pp. 4-5.

Questions Presented.

These are stated in the Petition, *supra*, pp. 2-3.

Statutes Involved.

These are indicated in the Petition, *supra*, pp. 3-6.

Statement.

A statement of the case appears in the Petition, *supra*, pp. 6-7.

Errors to be Relied Upon.

The Circuit Court of Appeals erred—

1. In holding that the petitioners are engaged in interstate commerce within the meaning of the National Labor Relations Act.

2. In holding that no effect upon commerce need be shown in order for the National Labor Relations Board to direct an order against the petitioners.

3. In enforcing the order of the National Labor Relations Board against the petitioners.

Summary of Argument.

A concise summary of the ensuing argument is set forth in the foregoing Petition, under the heading of "Petitioners' Contentions" (*supra*, pp. 17-19).

Argument.

POINT I.

The Congressional power granted by Congress to the National Labor Relations Board through the National Labor Relations Act was not given for the purpose of regulating interstate commerce, but was to exercise the authority Congress had to facilitate the amicable settlement of disputes which threatened the service of the necessary agencies of interstate transportation. It was this reasoning which supported the decisions in the following cases:

Texas N. O. R. Co. v. *Brotherhood of Railway Steamship Clerks*, 281 U.S. 548.

Virginian Railway Co. v. *System Federation No. 40*, 300 U.S. 515.

Associated Press v. *National Labor Relations Board*, 301 U.S. 103.

Schechter Poultry Corp v. *United States*, 295 U.S. 495 (reversing in part and affirming in part 8 Fed. Supp. 136, and reversing 76 F. (2d) 617).

The above-cited cases support the contention of the petitioners that interstate commerce must first be established in order that the effects of a labor dispute, which might arise, may show a burden or obstruction of that commerce.

Kindly note in the case of *Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board,* 301 U.S. 142, which company undoubtedly was engaged in interstate transportation for hire, the Court held that the National Labor Relations Act "limits the jurisdiction of the Board to *instances* which fall within commerce power, and if the Board should exceed the jurisdiction conferred upon it, any party aggrieved is at liberty to challenge its action." See also *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U.S. 261, in which case the employees involved were mechanics who repaired buses of their own company engaged in interstate transportation and in which case the Court said: "Such servicing is essential to the safe and regular functioning of the system." In the cases at bar the services rendered by the employees herein involved are not, on the evidence in the record, necessary for the regular functioning of the businesses of the petitioners in so far as the sales of motor vehicles, parts, accessories, and equipment are concerned.

In the *Denver Automobile Cases* (10 N.L.R.B. 1173), which the Board relied upon in making its decision and order, it is called to the attention of the Court that in answers filed by the respondents in those cases they admitted transporting automobiles over state lines in making deliveries to their customers and to their respective dealers.

In *In re Shierbrock Motors* (15 N.L.R.B. 120) the Board itself makes the distinction by placing credence upon the fact that "the deliveries were made by the particular distributors to associated dealers located outside the State lines."

Point II.

Since the Congressional power granted to the Board can only attach to matters which affect commerce, it must necessarily follow that the fact-finding body must determine sufficient facts supported by evidence that this commerce is affected or there exists sufficient evidence to warrant a finding of fact that the aforementioned commerce will be threatened.

Senate Committee Report No. 572:

> "Insofar as the N.L.R.B. is concerned, the power to regulate interstate commerce under the N.L.R.A. is confined only to matters that burden, effect or obstruct interstate commerce or which have led or tend to lead to labor disputes that might have such effect upon interstate commerce."

In support of the Senate Committee Report the Court in the case of the Jones & Laughlin Steel Corporation said: "The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce, and, thus qualified, it must be considered as contemplating the exercise of control within constitutional bounds."

This language is important, since it conveys sufficient authority to assume that it is not industry that the Act seeks to control, but the individual activities, if any as qualified, with emphasis upon the effects on interstate or foreign commerce. Hence, it is logical that persons engaged in the same industry do not necessarily come within the jurisdictional power of the National Labor Relations

Act unless the individual facts establish an obstruction, burden, or effect upon interstate commerce.

The petitioners respectfully submit that the Board has failed to show any findings supported by evidence that the activities of the petitioners have had or may have any effect upon commerce within the meaning of the National Labor Relations Act. On the contrary, the evidence will substantiate the fact that a strike was in progress for approximately ten weeks from May 1, 1939, to July 6, 1939, and that during that period the businesses of the respective petitioners had increased substantially over the corresponding period of the previous year, when no industrial strife was present (R. 110, 153, 192).

The learned Circuit Court of Appeals in this regard says as follows: "Finally, respondents contend that the strike called by their employees in 1939 and quickly abandoned actually did not interfere with interstate commerce and that even if a strike were successful the interstate business could be otherwise handled so as to prevent its disruption. Such contentions have no merit and have previously been denied." In this regard the petitioners respectfully submit that a strike of the duration of ten weeks or more cannot be referred to as a strike quickly abandoned, and that, in so far as the statement of the learned Circuit Court of Appeals is concerned relative to the business being otherwise handled, your petitioners contend that there is no evidence in the record to support that contention.

Point III.

In regard to the view adopted by the learned Circuit Court of Appeals to the effect that "we do not rely on the fact that 100% of respondents' purchases of new cars are shipped to respondents from without the state," your petitioners respectfully contend that this conclusion by the learned

Circuit Court of Appeals is incorrect, and that the cases cited by the learned Circuit Court of Appeals are not in support of that contention, for the following reasons:

In the cases cited by the learned Circuit Court of Appeals, one of the parties in each of the cases cited is a manufacturer or processor of merchandise, which ultimately finds itself in interstate commerce or as an agency of such commerce.

National Labor Relations Board v. *Bradford Dyeing Association, supra.*

Consolidated Edison Co. v. *National Labor Relations Board, supra.*

National Labor Relations Board v. *Jones & Laughlin Steel Corp., supra.*

Santa Cruz Fruit Packing Co. v. *National Labor Relations Board, supra.*

The only evidence in the cases at bar which might give credence to the contention that the products sold by the petitioners are used in interstate commerce is the allegation by the Board that the petitioners sell trucks, and the petitioners submit that there is no evidence in the record to support that contention and refer this Court to the Circuit Court of Appeals decision, *supra,* p. 10, which supports the petitioners' contention on that point.

S. S. Kresge Co. v. *Amsler,* 99 Fed. 503 (U.S. D.C. E.D. Mo.).

Compare *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.,* 301 U.S. 58.

Point IV.

It appears that the learned Circuit Court of Appeals, as well as the National Labor Relations Board, has relied to

a great measure upon the decision of this Court in *National Labor Relations Board* v. *Bradford Dyeing Association, supra.* In this connection, it is the contention of the petitioners to point out, *first,* that the Bradford Dyeing Association were processors; *second,* the findings of fact by the Board that in the event of industrial strife the plant would be closed and therefore the inference that interstate commerce would be obstructed was a proper one is not analogous to the facts that were presented before the learned Circuit Court of Appeals in these cases. The petitioners refer to the language of this Court in that case when it said: "Since the purpose of the Act is to protect and foster interstate commerce, the Board's jurisdiction can attach before actual industrial strife materializes to obstruct that commerce." The petitioners submit that, in the cases at bar, *the industrial strife actually occurred* and the facts remain uncontradicted that no effect upon commerce existed, *first,* because the employees involved had no connection with that commerce, and *second,* that the petitioners did not transmit, ship, or deliver any of their merchandise across state lines, and *third,* that the petitioners did not engage, hire, or operate any vehicles, trucks, or agencies in transporting any of the wares that they purchased and sold.

Distinguish from the following: A local newspaper company which delivers only 17.3 per cent of its total circulation outside the State of publication is subject to the Act where a stoppage of its activities would directly affect interstate commerce. The nature of the particular business is immaterial; it is the effect of the unfair labor practices on interstate commerce which is the controlling factor. The court in reaching its decision said that ". . . the nature of the particular business or activity is immaterial. If a person, no matter what the character of his business is, engages in an unfair labor practice which affects commerce, the Board may assume jurisdiction of the matter. It is the

effect of the unfair labor practices on commerce which is the controlling factor . . . In the instant case, the strike halted interstate shipments. Such cessation was a direct result of the strike. It is therefore clear that the unfair labor practices directly affected interstate commerce."

National Labor Relations Board v. *Hearst et al.* (C.C.A. 9, 1939).

Point V.

The Congressional power to regulate interstate commerce as heretofore mentioned, of course, does not apply unless there be an agency of transmission of such goods to the several States. To argue otherwise would be to destroy intrastate commerce in its entirety, and since this Court has said that intrastate commerce still exists, we must assume that a retailer of goods is expected to sell his wares for local consumption, and the mere fact that a person residing in another State, while passing through the jurisdiction where the petitioners maintain their businesses makes a purchase, is purely incidental, and as far as Congressional power to regulate is concerned, there can be none, since this transaction is purely local. Were this not so, every newsdealer selling out-of-town newspapers to persons undoubtedly from out of town seeking home news would be engaged in interstate commerce; likewise, cigar and cigarette stands and other like enterprises.

The Board, as well as the Circuit Court of Appeals, has attempted to make much of the fact that the petitioners sell nationally advertised products. So do every well-known department store, men's furnishing shop, hat stores, and other retail establishments. The petitioners submit that not only do these facts fail to support the question of jurisdiction singly, but together they fall far short of all the elements necessary under the National Labor Relations Act

for the Board or the Circuit Court of Appeals to claim jurisdiction over the petitioners.

National Labor Relations Board v. *Fainblatt*, 306 U.S. 601.

Consumers Power Co. v. *National Labor Relations Board*, 113 F. (2d) 38.

In applying the language of this Court in the decided cases, it is the contention of the petitioners that, in order for them to come within the provisions of the National Labor Relations Act, the National Labor Relations Board and the Circuit Court of Appeals for the First Circuit must find and affirm as facts:

1. That the petitioners regularly ship their goods in interstate commerce; and

2. That the unfair labor practices have led or tend to lead to labor disputes which threaten to obstruct these shipments.

Both these points are refuted in this brief and by the record in the transcript of evidence.

Point VI.

The petitioners are Rhode Island corporations with principal places of business located at Providence, Rhode Island, and they are engaged in the purchase, sale, exchange, servicing, and repairing of new and used motor vehicles, parts, accessories, and equipment. There is no evidence in the record that the petitioners sell or distribute trucks. Each petitioner is known in the trade as a distributor or direct dealer and operates his respective business under a franchise given to him by his manufacturer. A close examination of the record will show that by far the greater portion of the petitioners' businesses is the

retail sale of motor vehicles and accessories, while the area granted to each petitioner by the manufacturer in which to conduct its business, in so far as the appointment of associate dealers is concerned, has little or no regard to state lines; the power to make such appointments and cover such areas rests with the petitioners.

Under the aforementioned franchises, the petitioners have made contracts with dealers. While it is true that the manufacturers require all their dealers to comply with certain regulations in form, they do not exercise any control over the petitioners' businesses nor do the petitioners in turn have any right to exercise any control over the operations of their dealers and their service stations. In all cases the petitioners take delivery of the motor vehicles purchased in the State of Rhode Island and have no right to exercise control over the merchandise while in transit (R. 73, 86, 122, 123, 168, 178, 182, 183). The petitioners make all deliveries of new and used motor vehicles, parts, and accessories purchased from them, at their respective places of businesses in the State of Rhode Island, and do not transport, ship, nor deliver said motor vehicles, parts, or accessories to any persons or firms located outside the State of Rhode Island (R. 75, 126, 182).

Conclusion.

To the 50,000 or more persons and concerns engaged in the business of purchasing and selling automobiles, it will seem a strange miscarriage and perversion of justice if, upon the decided cases referring to manufacturers and processors, the dicta therein shall be controlling to such an extent that persons engaged in purchasing and selling a commodity, such as the petitioners, are to be held to be engaged in interstate commerce within the meaning and provisions of the National Labor Relations Act.

It also appears to the petitioners that even though, as in the instant cases, the National Labor Relations Board, as well as the Circuit Court of Appeals, agrees that the petitioners are engaged in interstate commerce, it would seem that, in the absence of supporting evidence that a labor dispute had in fact threatened or obstructed interstate commerce, the National Labor Relations Board was without power to direct an order against them. This would be the natural result in the cases at bar if the evidence before the Board as recorded in the transcript of the record is controlling. The petitioners contend that this evidence must be controlling and that the Circuit Court of Appeals erred in refusing to give credence to the facts in the transcript and that the Board based its findings of fact upon matters not contained in the record and there was no evidence in the transcript of the record to support the findings made.

The Decision and Order of the National Labor Relations Board should be vacated, and the Order of the Circuit Court of Appeals for the First Circuit reversed.

Respectfully submitted,

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